No. 3985

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CONSOLIDATED CAUSES

UNITED STATES OF AMERICA,
Appellant,

vs.

BENEWAH COUNTY, IDAHO, A. C. WUNDERLICK, C. A. WALKER, W. R. ARMSTRONG, and F. H. TRUMMEL,

and

KOOTENAI COUNTY, IDAHO, HANS JOHNSON, J. W. McCREA, FRANK A. MORRIS and S. H. SMITH,
Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

E. G. DAVIS,
United States Attorney,

McKEEN F. MORROW,
Assistant United States Attorney,
Residence, Boise, Idaho,
Solicitors for Appellant.

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STATEMENT OF THE CASE.

The Bills of Complaint in each of the above cases were filed by the United States on behalf of a Coeur d'Alene Indian in order to test the validity of taxes levied for State and County purposes by defendants against the lands of the Indians. As the same questions of law and fact were presented in each case, they were consolidated by order of the court (Tr. pp. 18, 35). The consolidated cases were heard upon the Bills and Answers, two stipu-

lations as to the facts (Tr. pp. 37, 43) and certified copies of certain declarations and correspondence of the office of Indian Affairs in the Department of the Interior (Tr. pp. 44-61). Upon final hearing, the learned District Judge entered a decree in each case dismissing the Bills of Complaint with prejudice, (Tr. pp. 19, 36) for the reasons set forth in his written decision (Tr. pp. 61-73).

The lands in question were formerly a part of the Coeur d'Alene Indian Reservation established by Executive Orders of June 14, 1867, and November 8, 1872, for the Coeur d'Alene Indians. These Indians were formerly possessed of a large and valuable tract of land lying in the territories of Washington, Idaho and Montana, which they ceded to the United States in accordance with treaties of March 26, 1887, and September 9, 1889, and these treaties were ratified by an Act of Congress approved March 3, 1891, (26 Stat. 981, 1026-1032).

On December 16, 1909, Trust Patents were issued to the Indians in question, Morris Antelope and Anasta Williams Smo, for the lands described in the Bills of Complaint (Tr. p. 42). The granting words of these Patents were as follows:

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, has allotted, and by these presents does allot, unto the said .....,
> the land above described, and hereby declares that it does and will hold the land thus allotted (subject

to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever, if said Indian does not die before the expiration of the said trust period." (Tr. pp. 42, 43).

These trust patents were issued pursuant to the provisions of the Act of June 21, 1906, (34 Stat. 325-335) and the General Allotment Act of February 8, 1887, (24 Stat. 388). In the year 1916, the Secretary of the Interior duly and regularly declared Antelope and Smo to be competent Indians and issued to them patents in fee, pursuant to the Burke Act of May 8, 1906 (34 Stat. 182), amending section six of the General Allotment Act of Feb. 8, 1887. This was done without any application on the part of the two Indians, and when notified, they refused to accept the patents and the same were held for delivery from that time until January 6, 1921, when they were revoked and cancelled by the Secretary of the Interior (Tr. p. 39).

During this period taxes were levied by Benewah and Kootenai Counties against these lands. The 1917 taxes, amounting to $272.81 in the case of Antelope, and $325.62 in the case of Smo, were paid under protest, while the taxes for the years 1918, 1919 and 1920, amounting to $1264.81 against the lands of Morris Antelope and to

$810.20 against the lands of Anasta Williams Smo, went delinquent, and delinquency certificates issued therefor in accordance with the laws of the State of Idaho, but collection of the same has been enjoined in these cases (Tr. p. 39). No taxes were levied for the year 1921, but at least one of the Counties has taxed the land for the year 1922, relying apparently upon the suggestion made by the court below in the last paragraph of its opinion, that the cancellation of the patent by the Secretary of the Interior might be ineffectual (Tr. p. 73).

The stipulations of fact further show, that no attempt has been made by the Indians to alienate their lands since they were declared competent except in regard to a right of way for road purposes and that from 1916 to 1921, the Department of the Interior treated the Indians as citizen Indians, and the defendants proceeded upon said assumption.

Upon this state of facts, the broad general question is presented, whether or not these lands were subject to taxation by the State authorities for the years 1918, 1919 and 1920.

ASSIGNMENT OF ERRORS.

The errors assigned by Appellant are set forth at pages seventy-nine and eighty of the Transcript, and may be summarized as follows:

1. That the court erred in holding and deciding in effect that the trust patents issued to the Indians in question did not confer vested rights upon them to have

the lands covered by their trust patents conveyed to them or their heirs at the end of the twenty-five year trust period free from all charges and incumbrances including taxes levied by the State authorities.

2. That the construction placed by the court upon the Act of Congress of May 5, 1906, (34 Stat. 182) was erroneous and that Act did not confer upon the Secretary of the Interior an unqualified authority in his discretion to declare an Indian competent and issue to him a patent in fee, but that Act merely extended to the Indian a privilege or election to have the trust period specified in the patent for his allotment curtailed upon his application provided the Secretary of the Interior in the exercise of his discretion determined the Indian to be competent and capable of managing his own affairs.

3. That the court erred in holding and deciding that the fee simple patents issued to these Indians rendered their lands subject to taxation prior to their acceptance by such Indians, or were of any force or effect prior to that time.

4. That the court erred in holding and deciding that the Secretary of the Interior had the unqualified authority to adjudge Indian allottees competent and issue fee simple patents to them without their consent, the effect of which would be to render their lands taxable.

BRIEF OF THE ARGUMENT.

The property of the Coeur d'Alene Indians could not be taken from them without their consent.

Organic Act of the Territory of Idaho, Act of March 3, 1863 (12 Stat. 808).

Idaho Admission Bill, Act of June 3, 1890 (Public 199).

Treaty with Coeur d'Alene Indians March 26, 1887.

Act of March 3, 1891 (26 Stat. 989, 1026-1032).

Statutes and treaties relating to property and rights of Indians are given a liberal construction by the court in favor of the Indians.

Choate vs. Trapp 224 U. S. 665, 56 L. Ed. 941.

Kansas Indians 5 Wall. 737, 760.

Jones vs. Meehan 175 U. S. 1.

Morrow vs. United States 243 Fed. 654.

Chase vs. United States 222 Fed. 593.

The agreement on the part of the United States to hold the land included in the trust patents issued in 1909, free from all charges and incumbrances for the period of twenty-five years, created vested property rights in the Indians, Antelope and Smo to have the land held free from taxation during that period.

Act of June 21, 1906 (34 Stat. 325, 335).

General Allotment Act of February 8, 1887 (24 Stat. 388, 391, Sec. 5).

Morrow vs. United States 243 Fed. 854 (C. C. A. 8th Circuit).

Choate vs. Trapp 224 U. S. 665, 56 L. Ed. 941.

Gleason vs. Wood 224 U. S. 679, 56 L. Ed. 947.

English vs. Richardson 224 U. S. 680, 56 L. Ed. 949.

Ward vs. Love County 253 U. S. 17, 64 L. Ed. 751.

Williams vs. Johnson 239 U. S. 414, 421, 60 L. Ed. 358.

The Secretary of the Interior had no power under the Burke Act of May 8, 1906, to declare an Indian competent and issue a fee patent to him without an application by the Indian or his subsequent consent and acceptance of such patent.

Act of May 8, 1906 (34 Stat. 182).

Report of Committee on Indian Affairs (No. 1998, 59th Congress).

Choate vs. Trapp 224 U. S. 665, 56 L. Ed. 941.

Morrow vs. United States 243 Fed. 854.

Irwin vs. Wright 258 U. S. 219, 66 L. Ed.....

Fee simple patents issued to Indian allottees without previous application by them must be accepted by the Indians in order to become effective, and the rule as to the necessity of delivery of an ordinary public land patent does not apply in such cases.

United States ex rel. Prettybull vs. Lane, 47 App. D. C. 134.

Northern Pacific Railway Company vs. United States, 227 U. S. 355.

La Roque vs. United States 239 U S. 62.

Ash Sheep Company vs. United States, 252 U. S. 159.

ARGUMENT.

The substantial question involved in these cases is the right of the State authorities to tax the lands of the Indians, Morris Antelope and Anasta Williams Smo, under the facts outlined in the above statement, and in order to determine this matter we must first consider the pertinent provisions of the treaties with the Indians and the Acts of Congress bearing upon the question.

The Organic Act of the Territory of Idaho approved March 3, 1863, (12 Stat. 808) provides in part as follows:

> "PROVIDED FURTHER, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such right shall remain inextinguished by treaty between the United States and such Indians, or include any territory, which, by treaty with the Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said Territory, or to affect the authority of the Government of the United States, to make any regulations respecting such Indians,

> their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the Government to make if this Act had never been passed."

There is nothing in the Idaho Admission Bill approved July 3, 1890 (Public 199) or in the Constitution of the State of Idaho ratified by that Act, which in any way modifies or affects the above provisions.

Article 5 of the treaty with the Coeur d'Alene Indians made March 26, 1887, which was approved and ratified by the Act of Congress March 3, 1891, (26 Stat. 989, 1026-1032) provides in part as follows: "In consideration of the foregoing cessions and agreements it is agreed that the Coeur d'Alene Indian Reservation shall be held forever for Indian land and as homes for the Coeur d'Alene Indians * * * and no part of said Reservation shall ever be sold, occupied, open to white settlement, *or otherwise disposed of without the consent of the Indians residing on said Reservation.* (Our italics).

The Indian Appropriation Act of June 21, 1906, (34 Stat. 325, 335,) provided for allotments in severalty on this Reservation in the following language:

> "That as soon as the lands embraced within the Coeur d'Alene Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Coeur d'Alene Indian Reservation, to each man, woman,

and child one hundred and sixty acres, and, upon the approval of such allotments by the Secretary of the Interior he shall cause patents to issue therefor under the provisions of the general allotment law of the United States."

The general allotment law was the Act approved February 8, 1887, (24 Stat. 388-391), Section 5 of which provided in part as follows:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, *and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.*" (Our italics).

Section 6 of the General Allotment Act as originally enacted provided for the granting of citizenship to certain Indians, but this section was amended by the act approved May 8, 1906, (34 Stat. 182) providing that upon

the issuance of fee patents to Indians they should become subject to all laws of the State or Territory in which they resided, and containing, also, the following proviso:

> "*Provided,* That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *and provided further,* That the provisions of this Act shall not extend to any Indians in the Indian Territory."

It may be noted that at the time the Act of June 21, 1906, was introduced in Congress, the amendment had not been made, but apparently it had already been introduced, and it was passed and approved by the President prior to the statute providing for allotments to the Coeur d'Alene Indians.

The decision of the learned District Judge is based in the main upon three propositions, first, that the issuance

of the fee patents, followed by tender thereof to the Indians conveyed the legal title and relieved the Government of its trust without the actual physical delivery of the patents, following the established doctrine that a patent to public lands is effective upon its issuance and without actual delivery to the patentee; second, that the Indians had no vested right to hold their allotments free from taxation for twenty-five years because the trust patents were by their terms issued "subject to all statutory provisions and restrictions" and this reservation included the right of the Secretary under the Act of May 8, 1906, to declare the Indians competent and issue fee patents to them which would make their lands taxable; third, Congress by the Act of May 21, 1906, conferred upon the Secretary of the Interior the unqualified authority within his sound discretion to declare an Indian competent and issue to him a fee patent without the consent of such Indian or his acceptance of the patent.

The United States as Trustee for Indian wards throughout the country owes a duty to such wards to protect and safe-guard their rights, and feeling as we do, that each of the propositions relied upon by the learned trial court is incorrect and erroneous as applied to the facts of these cases, we respectfully submit that the true rules of law applicable here are as follows:

1. Under the treaties, the Acts of Congress relating to the Coeur d'Alene allotments and the trust patents, Morris Antelope and Anasta Williams Smo, each had a

vested right to hold their land for the full trust period of twenty-five years free from taxation.

2. The Act of May 8, 1906, merely conferred upon Indian allottees a privilege or election to have the trust period specified in the patent for their allotments curtailed upon their application provided the Secretary of the Interior in the exercise of his discretion should determine the particular Indian to be competent and capable of managing his own affairs.

3. The ordinary rule as to the effect of issuing a patent without delivery in public land cases does not apply where the Secretary of the Interior determines an Indian allottee competent and issues to him a fee patent without previous application therefor, and in the absence of such previous application the fee patent is inoperative and ineffectual until the Indian accepts the patent, and in the event of his refusal to accept the patent, the Secretary of the Interior retains jurisdiction and authority to cancel and revoke the patent with the Indian's consent.

TRUST PATENTS CONVEYED VESTED RIGHTS.

We have seen that section 5 of the Coeur d'Alene treaty of March 26, 1887, provided that "no part of said Reservation shall ever be sold, occupied, open to white settlement, *or otherwise disposed of without the consent of the Indians residing on said Reservation;*" that section 5 of the General Allotment law of 1887 provided for the issuance of trust patents which should declare "*that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as*

aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever;" and that the trust patents issued in these cases contained the following language in the granting portion:

> "NOW KNOW YE, That the UNITED STATES OF AMERICA, * * * hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, *and at the expiration of the said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free from all charge and incumbrance whatsoever,* if said Indian does not die before the expiration of the said trust period." (Tr. pp. 42, 43).

It will be noted that section 5 of the Allotment Act and the patent contained two separate clauses, first, a declaration that the land will be held in trust for twenty-five years and, second, that at the end of that period the United States will convey the land free of all charges and incumbrances. In the patent itself, the words "subject to all statutory provisions and restrictions" are inserted by way of parenthesis in the first of these clauses, and the learned District Judge construed this qualification to mean, that the provision of the second clause as well as the first was subject to the right and power of the Secretary of the Interior, whenever he should con-

sider a particular Indian to be competent to terminate the trust period without any application or consent on the part of the Indian and to issue to him a patent in fee which would be in full force and effect from the time it had been signed, countersigned, sealed, and recorded in the register of patents in the General Land Office at Washington.

This construction seems to us to leave out of consideration the positive statement in the treaty that the lands of the Reservation shall never be disposed of without the consent of the Indians residing on said Reservation, and it seems, further, to construe the provisions of the patent, the statutes and the treaty most strongly against the Indian when as a matter of fact it is thoroughly established that in connection with Indian matters the rule of construction should be exactly the opposite.

Thus, in the case of Choate vs. Trapp 224 United States 665 at page 675, 56 L. Ed. 941, the court states:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; *doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.* This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.
>
> "For example, in *Kansas Indians,* 5 Wall. 737,

760, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale for state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Mr. Justice Davis, in speaking for the court, said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice Marshall, who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of susceptible of a more extended meaning. * * *' Again, in *Jones* vs. *Meehan,* 175 U. S. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws.''

To the same effect are Morrow vs. United States 243 Federal 854, and Chase vs. United States 222 Federal 593, 138 C. C. A. 117.

It has been thoroughly established that the provision in the Allotment Act and in the trust patents, to the effect that the land shall be conveyed free of all charges and

incumbrances means that it shall be conveyed free from taxes imposed under State authority. Thus in the case of Morrow vs. United States, 243 Federal 854, the point involved was whether or not the land of an adult mixed blood Chippewa Indian on the White Earth Reservation in Minnesota patented under the provisions of what is known as the Nelson Act of June 14, 1889, (25 Stat. 642), became after the enactment of the Clapp amendment of June 21, 1906, (34 Stat. 353), subject to taxation by the State of Minnesota. The Nelson Act provided for patents in conformity with the provisions of the General Allotment Act, and the allotments in question had been made prior to the passage of the Act of 1906, which expressly declared that all restrictions as to taxation of allotments held under trust patents were removed.

At page 856, the court states:

> "There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. Williams v. Johnson, 239 U. S. 414, 420, 36 Sup. Ct. 150, 60 L. Ed. 357; Sizemore v. Brady, 235, U. S. 441, 449, 35 Sup. Ct. 135, 59 L. Ed. 308; Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; Chase v. U. S., 222 Fed. 593, 596, 138 C. C. A. 117. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty

or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.

"That exemption of land from taxation is a property right is established. Choate v. Trapp, supra. That this Indian had taken possession of and was enjoying this land under such an exemption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a binding agreement."

In his decision the learned trial judge sought to distinguish the case just quoted from on the ground that in that case, Congress had attempted to remove the tax exemption after the trust patent had issued, while in the present case the statute providing for the removing of this exemption was enacted prior to the act authorizing trust patents to the Coeur d'Alene Indians and prior also to the issuance of such patents, and held further that the provisions of the Act of May 8, 1906, must be read into the trust patents. This certainly is construing the statute and the patent most strictly in favor of the United States and against " a weak and defenseless people who are wards of the nation and dependent wholly upon its protection and good faith."

As we read the language of the Circuit Court of Appeals of the 8th Circuit in the above case it was the trust patent given to the Indian and accepted by him which constituted a valid contract and created in him a vested property right, and so in the present case the trust patents to Antelope and Smo when issued to and accepted by them gave them a vested property right to have the land mentioned therein conveyed to them "free of all charge or incumbrance whatsoever" at the end of the twenty-five year period, and as stated in the Morrow case at page 858, this meant in effect, freedom from taxation in the meanwhile. On the same page the court makes the following statement, as to the effect of the trust patent:

> "A trust patent in exact compliance with such understanding and agreement was issued this Indian, and under it he has taken and holds this land. His rights are vested and are impervious to alteration against his will except through the sovereign power of eminent domain. One of these rights was freedom from state and local taxation."

In the present case when these patents were issued the Secretary of the Interior had no more power or authority to deprive the Indians of these valuable property rights some seven years after they had been granted, than Congress had the power to do the same thing by statute in the Morrow case.

The court below seems to have overlooked the clear

distinction between the power of Congress over the vested property rights of Indian wards, and its power over their status as wards and restrictions on their dealing with their property as their own. This distinction is clearly brought out in the case of Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 941, a case involving the rights of the Choctaw and Chickasaw Indians under the Curtis Act of June 28, 1898, incorporating a previous treaty. This statute and the treaty provided for allotments which should be non-taxable while the title remained in the original allottee, or until the lapse of 21 years and provided further that part of the land could be alienated after one year, another portion after three years, and all of it after five years. May 26, 1908, Congress passed another statute removing all restrictions on sale and incumbrances and providing that allotted land under the Curtis Act should be subject to taxation.

The Court expressly states in its opinion, that it does not appear when the patents to the eight thousand Indians involved in the case issued, but that it was assumed that most, if not all of them, had issued prior to the admission of Oklahoma as a State, on November 16, 1907. At page 672 the Court states:

> "Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him."

At page 673 the Court states:

"*But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation.* The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years it might remain non-taxable for 16 years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary the privilege of non-taxability might last for 21 years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. *The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. Kansas Indians,* 5 Wall. 737, 756; *United States v. Rickert,* 188 U. S. 432.

Gleason vs. Wood, 224 U. S. 679, 56 L. Ed. 947, and English vs. Richardson, 224 U. S. 680, 56 L. Ed. 949, are companion cases to the Choate case, and follow the same rule. In Ward vs. Love County, 253 U. S. 17, 64 L. Ed.

751, the doctrine of the Choate case was reconsidered and reaffirmed, the Court saying:

> "As these claimants had not disposed of their allotments and twenty-one years had not elapsed since the date of the patents, it is certain that the lands were nontaxable. This was settled in *Choate vs. Trapp, supra,* and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the State and all its agencies and political subdivisions were bound to give effect to the exemption."

In the case of Williams vs. Johnson, 239 U. S. 414, 420, 60 L. Ed. 358, the Court had to deal with restrictions on alienation, and expressly recognized the distinction established by the Choate case.

The conclusion to be drawn from these decisions is that under the wording of the trust patent and section 5 of the General Allotment Law quoted above, the exemption from taxation promised in the clause declaring that the United States would convey the land free from incumbrances and charges was a property right which vested in the Indian upon his acceptance of the patent, while the provision that title should be held in trust by the United States for twenty-five years for the benefit of the Indian, was merely a restriction upon his power of alienation which the Secretary of the Interior, by de-

claring him competent to manage his own affairs, could remove. But surely the Coeur d'Alene Indians who accepted the patents conferring this clear exemption from taxation should not be held to have acquired a right merely to hold the land free from taxation until such time as the Secretary of the Interior of his own motion, and without consulting their wishes, should decide that they were to be deprived of the right.

For these reasons we do not think that the learned trial judge was justified in holding that the provisions of the Act of May 8, 1906, should be read into the trust patents and on the contrary, we feel that the above authorities clearly establish that the exemption from taxation was a vested property right conferred upon these Indians by their trust patents and that it could not be taken from them either by an Act of Congress or by an executive officer acting under the discretionary power conferred upon him by an Act of Congress.

POWER OF SECRETARY UNDER ACT OF MAY EIGHTH, NINETEEN HUNDRED SIX.

If the trust patents conveyed vested rights to the Indians Antelope and Smo, they could not, of course, be deprived of such rights either by Congress or by the Secretary of the Interior, but in view of the fact that the court below held that such rights as these Indians acquired under their trust patents were subject to the power of the Secretary of the Interior under the Act of May 8, 1906 (34 Stat. 182), amending Section six of the

General Allotment Act, we must consider what power and authority was intended to be conferred and was conferred upon that officer by the Act in question. The learned District Judge held that "Congress intended to confer upon the Secretary of the Interior the unqualified authority within his sound discretion, to declare an Indian competent and to issue to him a patent in fee." We feel that in view of the evil intended to be remedied by this statute, and its purpose as shown by the committee reports and the debate at the time of the passage of this Act, and in the light of the liberal construction which the courts give to statutes and treaties dealing with the rights of Indians, it must be held that Congress merely intended that the discretionary power conferred upon the Secretary of the Interior, to declare an Indian competent and issue to him a patent in fee, should be exercised only upon application by such Indian, and that where the declaration was made and the patent issued without consulting the Indian, there was no intention that he should be deprived of valuable property rights without his consent, and accordingly the patent should only become effective upon its acceptance.

The Act of May 8, 1906, is frequently referred to as the Burke Act, and before its passage an Indian who wanted to be relieved from the restrictions on alienation and to obtain patent in fee for the land in his allotment prior to the expiration of the trust period, had to obtain the passage of a special Act of Congress, in order to accomplish this purpose.

In its report on this Bill the Committee on Indian Affairs states (No. 1998, 59th Congress):

> "In the opinion of the Committee this provision is advisable, as it will make it unnecessary for legislation granting fee simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary, and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs."

In a letter from the Commissioner of Indian Affairs to the Secretary of the Interior, dated February 8, 1906, which is included in the above report, the following statement is made with reference to this provision:

> "In the past the Indian Office has made many recommendations for special legislation authorizing you to gratify the aspirations of individual Indians for citizenship by issuing to them patents in fee for their lands; but, as a fundamental principle of good government special legislation should be avoided and both the Department and members of Congress relieved of the importunities of interested parties for enactment designed to benefit only themselves.
>
> "The proposed amendment will not only substitute general for special legislation, but for those allottees who are not fitted for the responsibilities of citizenship it will provide a probationary period

during which any who have both the ability and the ambition may prepare themselves for the desired change."

On the date the bill was passed the following reference to it is found in the Congressional Record:

"Mr. Dixon of Montana: Mr. Speaker, I want to ask the gentleman from South Dakota (Mr. Burke) if the purpose of the bill is not to prevent the blanket Indians by wholesale becoming citizens by allotment, and still allow the intelligent Indians *on application* to become citizens by allotment?

"Mr. Burke, of South Dakota: That is the purpose of the law, and further, to protect the Indians from the sale of liquor."

If we construe this statute liberally in favor of the Indian in accordance with the rule laid down by the Supreme Court of the United States in the case of Choate vs. Trapp, 234 U. S. 665, 675, in the passage quoted above, and in the other cases which we have cited, it must be held that Congress did not intend that these valuable property rights should be taken from the Indians without their consent, and that the entire purpose and intent of the statute was to enable competent Indians who desired to obtain patents in fee, to do so without having to resort to special legislation. The right to have the land included in a trust patent held free and clear from the burdens of taxation for State and County pur-

poses for a period of twenty-five years is a property right and a valuable one. That it is a property right is established by the case of Choate vs. Trapp, Gleason vs. Wood, English vs. Richardson, Ward vs. Love County, and Morrow vs. United States, cited above. The value of such right is illustrated by the facts shown by those cases, and by the stipulation of facts in the record here (Tr. pp. 39). It appears that the total taxes against the Smo land for four years amounted to $1135.82, and against the Antelope land to $1536.22, or an average yearly tax of $283.95 in the one case and $384.05 in the other. When the fee patents issued in 1916, the trust period had eighteen years yet to run and on the above average, the total tax burden during this period would amount to $5117.10 in the Smo case, and $6894.90 in the Antelope case. Before such burdens are placed upon Indian wards without their consent, the language of the statute and the intent of Congress should be so clear and convincing as to admit of no possibility of doubt.

We have already shown that the purpose of the statute was to provide a convenient and practicable method for determining the competency of Indians who desired to be declared competent, and thus to enable such Indians to obtain full control over their lands and to become subject to the corresponding burdens, and under the established rule of construction relating to property rights of Indians, we think it should be held that the statute was the extension of a benefit to the Indian, in the nature of a privilege or election, to have the trust period of his al-

lotment curtailed upon his application provided the Secretary of the Interior in the exercise of his discretion, having in mind the trusteeship of the Government so that incompetent Indians might not waste their heritage, should find the Indian in question to be competent and capable of managing his own affairs. Otherwise, the effect of the statute would necessarily be to authorize the Secretary of the Interior to destroy valuable property rights of Indians without their consent. If such rights had fully vested as we argued in the forepart of this brief, it is obvious that no such power could have been conferred upon the Secretary, but if as urged by the learned Trial Court, the right acquired by these Indians was subject to the limitations contained in the Burke Act of May 8, 1906, nevertheless, we submit that this Act should not be so construed as to permit the Indian to be deprived of this valuable property right without his consent.

We do not think that the "Declaration of Policy" referred to by the court (Tr. pp. 58-61) or the Departmental correspondence (Tr. pp. 44-56) show that the Interior Department has construed this Act to give the unqualified discretion to the Secretary of the Interior to issue fee patents against the wishes of individual Indians. In fact the contrary is conclusively shown by the record here, because the patents in question were rejected by the Indians, and later canceled by the Secretary. Furthermore, since the letter of November 23, 1920, (Tr. p. 57) declarations of competency have only

been made and fee patents issued upon application by the Indians. Previously to that time it seems that the recommendations of the competency commissions were acted upon in many cases without application by the Indian and in such cases where the Indian declined to accept the patent, it has in course of time been canceled.

Another argument advanced by the court is that of inconvenience to the various communities, because of being unable to tax Indian lands. We do not think any great weight should be given to this argument because the Supreme Court of the United States in the recent case of Irwin vs. Wright, 258 United States 219, 66 L. Ed. ..... decided March 20, 1922, rejected a similar argument based upon a much stronger state of facts. In that case the Supreme Court held that reclamation homesteads, after the preliminary proof of residence and cultivation required under the general homestead law, were nevertheless not taxable until the final proof of reclamation of half the land had been made and final certificate issued, and this holding was made, notwithstanding the fact that five or ten years might intervene between these proofs in which no residence was required and in which the land could be freely sold or incumbered. It should be noted that in this decision the Supreme Court of the United States declined to follow the decision of Judge Dietrich in the case of the United States vs. Canyon County 232 Federal 985, and the decision of the Supreme Court of Idaho in Cheney vs. Minidoka County 26 Idaho 471, both of which decisions were

based, in part at least, upon the same argument of inconvenience that is advanced in the decision here appealed from.

For these reasons we believe that under a proper construction of the Burke Act of May 8, 1906, the power of the Secretary of the Interior is limited to declaring an Indian competent and issuing him a fee patent in cases where the Indian makes application for this purpose, and that when in a case like the present, a fee patent is issued without previous application, it does not become effective until acceptance, and if it is rejected the Secretary has the power of cancellation. This brings us to a consideration of the necessity of acceptance of a fee simple patent to Indian lands by the Indian himself in order to make it effective for any purpose.

FEE PATENTS TO INDIANS REQUIRE ACCEPTANCE TO MAKE THEM EFFECTIVE.

At page 66 the court dismisses the argument advanced on behalf of the Indians that the patents were never accepted, by stating the general rule applicable to public land cases that a patent is effectual without actual physical delivery, citing the leading case of United States vs. Schurz, 102 United States 378, and United States vs. Laam 149 Federal 581. This holding leaves out of consideration the well established distinction between "Indian lands" and "public lands" generally, and gives no consideration to the fact that the ordinary public land patent is issued on application by the entryman while

these patents were issued without previous application and without previous consent. In the public land case the contract is complete when the entryman's offer is accepted and the patent is issued, while in the present case the fee patents were issued without application by the Indian and instead of there being an offer by the Indian and an acceptance by the United States, the offer was made by the United States and the Indians promptly and unequivocally rejected the offer and declined to enter into the contract. After all a patent from the Government in the ordinary public land case is nothing more than an executed contract, and as such it is based upon the fundamental requirement of the law of contracts that there must be both an offer and an acceptance to constitute a contract. The same would be true in the case of an Indian holding a trust patent who made application for a fee patent. But the Indians Smo and Antelope made no such application, and their rights were governed by their trust patents evidencing the original contract until such time as they entered into a new contract. Under these circumstances, the patent issued by the Government was a mere offer and of no force or effect until accepted by them.

This construction seems to us to be amply supported by the decision of the Supreme Court of the District of Columbia in the case of United States, ex rel. Prettybull vs. Lane, 47 App. D. C. 134. This was an action for writ of mandamus against the Secretary of the Interior. Relator was a Yankton Sioux and the lands involved had

been allotted under the Act of February 8, 1887, but the precise date of the allotment does not appear. On April 28, 1916, the Secretary under authority of the Act of May 8, 1906, adjudicated the Indian competent and directed the issuance of patent in fee. This patent was duly signed, countersigned, sealed, and recorded in the book of patents at Washington, and appellant was notified that the Secretary of the Interior would be at the agency on May 13, 1916, to deliver the patent. Upon his arrival at the agency, however, the Secretary discovered that certain misrepresentations had been made as to the competency of the Indian, and he accordingly declined to deliver the patent on the ground that he had been falsely and fraudulently induced to believe that the Indian was competent. The court declined to issue the writ of mandamus and so far as we are able to ascertain no attempt was made to review the decision. This decision is directly contrary to the decision in United States vs. Schurz, 102 United States 78, unless we accept the distinction between public land cases and Indian cases, because in the Schurz case a patent had issued for land covered by a valid townsite claim due to some mistake or inadvertence, and before delivery the Secretary attempted to recall the patent. However, a writ of mandamus issued and was sustained by the Supreme Court of the United States compelling him to deliver the patent.

The courts have held in a number of cases that a broad distinction is to be recognized between "Indian lands" and "public lands." In the case of Northern Pacific

Railway Company vs. United States, 227 United States 355, at page 366 the court said:

> "The Court of Appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such case, citing *Leavenworth Railroad Co.* v. *United States,* 92 U. S. 733; *Stewart* v. *United States,* 206 U. S. 185; *Minnesota* v. *Hitchcock,* 185 U. S. 373. Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud. We should hesitate to put the Government in that attitude. It rejects that atitude and accepts a greater responsibility. It yields to the rule which this court has declared—*that it will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'* 119 U. S. 1; 175 U. S. 1. *United States* v. *Winans, supra.*"

The court goes on to hold that the appellants were not within the provision of an express statute of March 2, 1896, limiting the time within which an action might be brought to annul a patent, and held that this act only applied to public lands of the United States and did not apply to Indian lands.

In the later case of La Roque vs. United States 239 U. S. 62, the court reaffirmed this doctrine, saying at page 68:

> "The suit was brought between six and seven years after the date of the trust patent, and because of this it is urged that the suit was barred by paragraph 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1099 (see also c. 559, p. 1093) which provides that 'suits by the United States * * * to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.' This contention must be overruled upon the authority of *Northern Pacific Ry.* v. *United States* 227 U. S. 355, 367, where it was held that this section is part of the public land laws and refers to patents issued for public lands of the United States. This trust patent was not issued for public lands of the United States, but for reserved Indians lands to which the public land laws had no application. And it may be well to observe in passing that the Circuit Court of Appeals directed that there be embodied in the decree a provision that the Government holds the lands in the same way it held them before the

patent was issued, that is, as reserved Indian lands.''

See also Ash Sheep Company vs. United States, 252 U. S. 159, where, after an elaborate consideration the court held that the lands in question were ''Indian lands'' and not ''public lands.''

Under these authorities it seems entirely clear that the rule applying to patents to public lands should not be applied to fee patents to Indian lands issued without previous application by the Indian, because to do so disregards the clear distinction between Indian lands and public lands and also violates one of the most fundamental principles of the law of contracts that in order to constitute a contract between two parties, an offer and an acceptance is necessary. Certainly this rule should not be abrogated in a case between the all powerful Government of the United States and an Indian who had theretofore been in the position of a mere ward of the Government. In this connection we might also call attention to the fact that the Counties and their officers who are appellees here are not parties to the contract, and that another fundamental principle of the law of contracts is that a contract can be rescinded or annulled by consent of the parties thereto.

For these reasons we respectfully submit that the fee simple patents were not effective to render the lands subject to taxation until acceptance by the Indians, that the trust patents issued in 1909 gave the Indians a vested

property right to have their lands held free from taxation for the period of twenty-five years and at the end of that period to have them conveyed by the United States free from all burdens imposed by State or local authorities by way of taxation, and that the Burke Act of May 8, 1906, conferred no power upon the Secretary of the Interior to declare an Indian competent and issue to him a fee patent without the consent of such Indian, but rather, it merely authorized the Secretary of the Interior, in the exercise of his discretion to declare an Indian competent and issue him a fee patent upon the application of such Indian. Accordingly we respectfully submit that the decree of the learned Trial Court should be reversed and that the mandate of this court should direct that decrees be entered cancelling the taxes and tax certificates described in the record.

Respectfully submitted,

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